UTAH INTERNATIONAL, INC.

IBLA 87-517 Decided february 21, 1989

Appeal from a decision of the Assistant Director for Program Review, Minerals Management Service, affirming an interest assessment for late payment of coal royalties. MMS-86-0227-MIN.

Affirmed.

1. Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties--Payments: Generally

   Where MMS imposes late payment charges in accordance with 30 CFR 218.200(a) (1986), a coal lessee may not invoke the estimated payment exception in that regulation when there is no evidence that the lessee sought prior authorization from MMS to make estimated payments.

2. Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties--Estoppel

   Estoppel will not lie against the Government to preclude collection of late payment charges where a coal lessee allegedly makes royalty payments based on the erroneous advice of a Government employee concerning the royalty rate, but the record shows that the lessee was not ignorant of the true facts concerning the effective date of a new royalty rate.

APPEARANCES: Donald L. Humphreys, Esq., San Francisco, California, for appellant; Peter J. Schaumberg, Esq., Howard Chalker, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Utah International, Inc. (Utah International), appeals from an April 10, 1987, decision of the Assistant Director for Program Review, Minerals Management Service (MMS), affirming interest assessments based on late payment of royalties due under coal leases NM-045196 and NM-045197.

By decision dated November 25, 1980, the Bureau of Land Management (BLM) approved a sublease agreement between Utah International, as sublessor, and its wholly owned subsidiary, San Juan Coal Company, as sublessee, involving, inter alia, the two leases in question. 1/ Approval of the agreement was made subject to certain special stipulations, including stipulation number 4 which provided in relevant part:

> 4) The royalty due the United States will be computed for each royalty period as follows:
>
> a) From the effective date of the transfer to December 1, 1981, or to the next readjustment date of leases NM-045196, NM-045197 and NM-045217, whichever is first, the royalty will be six percent of the value of coal mined by surface methods and eight percent of the value of coal mined by underground mining methods.
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> * * * * * * *
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> c) Beginning with December 1, 1981, or the effective date of the next readjustment for leases NM-045196, NM-045197 and NM-045217, whichever is first, * * *, the royalty, unless otherwise modified upon readjusting the leases, will be equal to 1.11 times the value of the overriding royalty reserved by the lessee, as per the subleasing agreements, or twelve and one-half percent of the value of the coal mined by surface methods and eight percent of the value of coal mined by underground methods, whichever is greater. [Emphasis in original.]

Special Stipulations - Coal Subleases Dated August 18, 1980, NM-045217, NM-045196, NM-045197, SF-071448 at 1. 2/

By notices dated August 27, 1981, BLM informed Utah International that leases NM-045196 and NM-045197 would be readjusted effective November 1, 1981, and that the new royalty rates would be effective that same date. The record does not contain copies of the readjusted leases; however, the following section from them is quoted in Utah International's statement of reasons:

1/ The record shows that some filings in this case were made by San Juan Coal Company, and others by Utah International. To avoid confusion, all subsequent references will be to the parent company, Utah International.

2/ Appellant maintains parenthetically that the stipulations were unauthorized, arguing that BLM lacks authority to condition approval of coal lease transfers on amended lease terms unless to do so entails the statutory readjustment at the end of the lease period (Statement of Reasons (SOR) at 4). However, since there is no evidence that appellant challenged the stipulations at the time of their imposition and the stipulated royalties became effective with the subsequent readjustment of the leases, we need not determine whether the stipulations were authorized.

> Section 6. PRODUCTION ROYALTY. To pay the lessor a royalty equal to 1.11 times the value of the overriding royalty reserved by the lessee, as per sublease agreements approved by BLM Decision dated November 25, 1980, or 12.5% of the value of coal mined by surface methods and 8% of the value of coal mined by underground methods, whichever is greater.

(SOR at 3).

Utah International timely objected to the readjustments. BLM overruled those objections on May 28, 1982; Utah did not appeal the readjustment decisions.

Utah International paid royalties on coal produced in November 1981 from the leases at the 12.5-percent rate. In a letter to Utah International dated January 19, 1982, the Geological Survey (GS) District Mining Supervisor stated, "The royalty rate remains at 6% of the coal value until December 1, 1981. * * * You should credit your account with the overpayment of $423,272.40 on your next royalty payment" (Letter of Jan. 19, 1982). 3/ Utah International took a credit in that amount for its December 1981 royalty payment.

By letter dated December 13, 1985, MMS advised Utah International that it had underpaid royalties in November 1981 and December 1981 for the two leases in question in the amount of $925,552.26. MMS explained at pages 2-3 of the letter:

> We recomputed royalties for December 1981 using 1.11 times the value of the overriding royalty, as this number was greater than 12.5 percent of the unit value of coal sold. The above method of computing royalty was also applied to November's sales, as special stipulation 4(a) of the BLM decision approving the sublease agreements states that the royalty computed at 6 percent of the value of coal mined would be effective only until the next readjustment date of the subject leases, which was November 1, 1981.

MMS gave Utah International the opportunity to object to its calculation of the proper royalty; however, Utah International paid the royalty without objection.

By letter dated January 31, 1986, MMS informed Utah International that it was assessing interest, in accordance with 30 CFR 218.200, in the amount of $388,523.35, based on the late payment of the $925,552.26 for royalty due

3/ By Secretarial Order No. 3071, dated Jan. 19, 1982, as amended May 10, 1982, all minerals management functions previously performed by the Conservation Division, GS, were transferred to MMS. 47 FR 4751 (Feb. 2, 1982). Thereafter, by Secretarial Order No. 3087, dated Dec. 3, 1982, as amended Feb. 7, 1983, the onshore nonroyalty management functions of MMS were transferred to BLM.

in November and December 1981. Utah International appealed that determination and by decision dated April 10, 1987, the Assistant Director for Program Review, MMS, upheld the late payment charge. Utah International filed a timely appeal.

On appeal, appellant argues that in this case late payment charges are discretionary and that MMS should not have made an assessment. Further, it argues that MMS is estopped from assessing late payment charges. MMS admits that in certain circumstances late payment charges are discretionary, but that the exception is not applicable in this case and interest charges are, therefore, mandatory. MMS also maintains that equitable estoppel is not available under the facts in this case.

[1] The regulation concerning interest assessments on late payments provides:

> The failure to make timely or proper payment of any monies due pursuant to leases and contracts subject to these rules will result in the collection by MMS of the full amount past due plus a late payment charge. Exceptions to this late payment charge may be granted when estimated payments on minerals production have already been made timely and otherwise in accordance with instructions provided by MMS to the operator/lessee.

30 CFR 218.200(a) (1986). 4/

Appellant argues that it is entitled to the exception for the late payment charges because it made its payments timely and its payments were made in accordance with instructions provided by MMS. 5/ Appellant states that "MMS almost concedes that [Utah International's] remittances for November and December may be construed as 'estimated payments'" (SOR at 6). MMS argues, however, that the estimated payments exception applies only when the lessee "makes prior arrangements with MMS" to make such payments (Answer at 3).

In Cyprus Western Coal Co., 103 IBLA 278, 282 (1988), this Board recognized that a lessor does not qualify for the estimated payments exception when the record contains no evidence showing "arrangements with MMS to make estimated payments." In that case the company based its assertion that it qualified for the estimated payments exception on events which occurred after royalty payments had been made, and we found that claim to be without merit. There is no evidence in this case that appellant had sought approval from MMS to make estimated royalty payments for November and December

4/ On June 25, 1987, this regulation was redesignated, effective July 27, 1987, as 30 CFR 218.202(a). 52 FR 23815 (June 25, 1987).
5/ Appellant admits that it miscalculated the royalty for November 1981 when it paid using the 12.5-percent value method rather than 1.11 times the overriding royalty. Thus, appellant's arguments would only be applicable to the interest assessed on $423,272.40, which is the portion of the total underpayment related to the credit taken for December 1981.

1981. 6/ The lessee's characterization of a royalty payment as an "estimated payment" does not govern the applicability of the late payment regulation. In fact, even if appellant did qualify for the estimated payments exception, assessment of interest would not be prohibited, rather it would be discretionary with MMS. We find appellant's argument that it qualifies for the exception found in the late payment regulation to be unconvincing.

[2] Appellant's second argument is that equitable estoppel prevents MMS from collecting the interest assessment. This contention must also be rejected. This Board has adopted the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), to judge whether or not estoppel should lie in a particular case. 7/ Furthermore, this Board has stated: "Estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982). In addition, estoppel against the Government in matters concerning the public lands must be based upon affirmative misconduct, such as misrepresentation or concealment of material facts." Enfield Resources, 101 IBLA 120, 124 (1988). Finally, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official decision. Enfield Resources, supra at 126.

The requirements for application of this doctrine clearly are not present in this case. First, although the Government provided erroneous advice to appellant and it is arguable that such advice was included in a official decision, appellant did not rely to its detriment on that advice, since it had the use of its money during the entire period for which interest is assessed. Late payment charges are not penalties but simply represent the time value of money. Peabody Coal Co., 72 IBLA 337, 348 (1983). Assessment of the interest simply puts the parties in the same positions in which they would have been had proper royalty payments been made timely.

Second, appellant was not ignorant of the true facts. It correctly determined that the new royalty schedule became effective on November 1, 1981, and calculated its November payment based on its interpretation of that schedule. The language in both the sublease agreement and the readjusted leases unambiguously identifies the effective date of the new royalty schedule. The sublease agreement provides that the lower royalty will be computed "[f]rom the effective date of the transfer to December 1, 1981, or to the next readjustment date of [the] leases * * *, whichever is first."

6/ See Yates Petroleum Corp., 104 IBLA 173 (1988), for a discussion of MMS's estimated payment system as it relates to oil and gas.

7/ Those elements are:

"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." Georgia-Pacific Co., supra at 96, quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960).

(Emphasis supplied.) The notices of readjustment clearly indicated that the effective date of the readjusted leases, including the new rate schedules, was November 1, 1981.

Appellant suggests it believed that by objecting to the readjusted leases it had delayed their effective date. The record does not support such an interpretation. In a letter dated March 22, 1982, BLM informed appellant of the status of its objections and added: "To avoid any misunderstanding, we wish to clarify that rentals and royalties accrue from their effective dates, as specified in the notices of readjustment and readjusted lease form, even though objections have been filed" (Letter of Mar. 22, 1982, at 1).

In addition, appellant's objections to the readjusted leases were filed prior to its payment of the November 1981 royalty, which it calculated using the new, higher rate schedule. If it believed that the objection to the readjustments had delayed the effective dates of the new royalty schedules, presumably it would have calculated the November 1981 royalties using the older, lower rates.

Finally, in Gulf Oil Corp., 73 IBLA 328, 334 (1983), we interpreted 43 CFR 3451.2(d) (1981) and found that it did not allow a delay of the effective date of readjusted terms due to the filing of objections. It is well established that all persons who deal with the Government are presumed to have knowledge of duly promulgated regulations. Venlease I, 99 IBLA 387, 390 (1987). Thus, the suggestion that an objection to the lease readjustment might delay the effective dates of the new royalty schedules does not convince us that appellant was ignorant of the fact that the higher rates went into effect on November 1, 1981.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge